APPEAL NO. 010164

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on December 5, 2000, the hearing officer resolved the sole disputed issue by determining that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was timely disputed. The appellant (carrier) has requested review, asserting that the respondent (claimant) not only became "aware of" but also "possessed" Dr. S's written certification of an MMI date and a zero percent IR when he picked up Dr. S's records on December 6, 1999, took them to his new treating doctor, Dr. F, and discussed Dr. S's IR with Dr. F. The carrier also asserts that the hearing officer erred in applying the version of Rule 130.5(e) which became effective March 13, 2000, because the 90-day period to dispute the IR commenced on December 6, 1999, and thus had expired before March 13, 2000. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable lumbar spine injury. Not challenged are findings that on December 12, 1998, the claimant was sent to a clinic where he was diagnosed by and treated for a lumbar strain by Dr. S; that Dr. S released the claimant for regular duty on December 28, 1998, and certified that he had reached MMI on that date with an IR of zero percent; that Dr. S's certification was the first certification; and that Dr. S did not send his certification to the claimant, the carrier, or the Texas Workers' Compensation Commission (Commission) in 1998 or 1999, and that if he did, such was not received. Also undisputed are findings that the Commission apparently did not learn of Dr. S's certification until on or about July 31, 2000; that on August 1, 2000, the Commission sent an EES-19 letter to the parties giving written notice of the certification; and that the claimant is deemed to have received that letter on August 7, 2000. A benefit review conference on the disputed issue was held on October 12, 2000.

The claimant testified that he received no medical treatment for his injury from December 28, 1998, until January 6, 2000, when he had his first visit with his new treating doctor, Dr. F; that he signed the Employee's Request to Change Treating Doctors (TWCC-53) on December 3, 1999, and that Dr. F signed it on December 6, 1999; that at around the time that he and Dr. F signed the TWCC-53, he picked up his medical records from Dr. S and took them to Dr. F; that he glanced through these records but did not recall seeing a Report of Medical Evaluation (TWCC-69) certifying that he had reached MMI on December 28, 1998, with an IR of zero percent; and that when he had his first visit with Dr. F, Dr. F discussed Dr. S's IR and he, the claimant, disagreed with it but he did not see the TWCC-69.

The carrier contended that when the claimant retrieved his medical records from Dr. S on or about December 6, 1999, and "perused" them while taking them to Dr. F, he not only gained constructive knowledge of Dr. S's IR but was also then in possession of written notice of Dr. S's IR and that, therefore, the claimant's 90-day period in which he had to dispute Dr. S's IR commenced on the date he picked up and glanced over the records.

The hearing officer makes clear that she found the claimant's testimony credible and that she does not view the claimant's having glanced over his medical records after picking them up and his having discussed Dr. S's IR with Dr. F as the equivalent of having been provided with written notice of the IR. In Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, the Appeals Panel held that "the certification of MMI and impairment and the communication of such to the parties under Rule 130.5(e) require a writing" and that "[w]ritten communication of the IR to the parties should reduce confusion and controversy over the content of the communication." We are satisfied that the challenged factual findings of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge